Supreme Court U.S.
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No. 02-316

IN THE

Supreme Court of the United States

DONALD R. WILD and DIANA H. WILD,

Petitioners,

v.

SUBSCRIPTIONS PLUS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ACCEPTANCE INSURANCE COMPANIES, SCOTTSDALE INSURANCE COMPANY, AND PROGRESSIVE NORTHERN INSURANCE COMPANY

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STATEMENT PURSUANT TO RULE 29.6

Respondent Acceptance Insurance Companies ("Acceptance") has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Scottsdale Insurance Company ("Scottsdale") is a wholly owned subsidiary of Nationwide Insurance Company.

Respondent Progressive Northern Insurance Company ("Progressive") is a wholly owned subsidiary of Progressive Corporation.

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15 James Wm. Moore et al., *Moore's Federal Practice* ¶ 101.90 (3d ed. 2001) 2, 6

STATEMENT OF JURISDICTION

Respondents Acceptance, Scottsdale and Progressive assert that the question presented to this Court is moot. Therefore, the court is without jurisdiction to consider the issue presented. *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969).

STATEMENT OF THE CASE

Petitioners' Statement of the Case is incomplete.

The District Court for the Western District of Wisconsin granted motions to strike the brief and factual submissions of Petitioners in opposition to the Respondents' summary judgment motions. The district court held that Petitioners' submissions were untimely filed and in violation of a court order that provided the dates for filing and an order that no further extensions of time to file submissions would be granted to any party for any reason. The district court did note, "[a]s a practical matter, this ruling makes little difference to the outcome of the motions." (Pet. App. 23a)

On Petitioners' appeal to the Seventh Circuit, the court concluded that the District Court for the Western District of Wisconsin erred when the Court determined that it had no personal jurisdiction over Karleen Hillery ("Hillery"). (Pet. App. 7a)[1] The court of appeals also confirmed that, had the district court ruled correctly and found jurisdiction, Hillery would have been dismissed on the merits of the case, as was her company, Subscriptions Plus, Inc. *Id.*

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1. The court of appeals referred to decision from a pending state court action arising out of the same accident, *Forgues v. Heart of Texas Dodge, Inc.*, No. 99 CV0952 (Wis. Cir. Ct. Nov. 5, 2001), wherein the Wisconsin state court found personal jurisdiction over Hillery.

REASONS FOR DENYING THE PETITION

I. THE QUESTION PRESENTED IS MOOT

Petitioners maintain that the original transfer of their case from Louisiana to Wisconsin, pursuant to 28 U.S.C. § 1406(a), was improper on the grounds that the transferee court did not have jurisdiction over all the defendants. That issue presented by Petitioners for review by this court is moot. The controversy has been resolved by both the Seventh Circuit Court of Appeals and by the transferee court and the relief requested by Petitioners would no longer serve any purpose.

"A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell*, 395 U.S. at 496. If the relief requested by judicial review would no longer serve any purpose, the issue is declared moot. 15 James Wm. Moore et al., *Moore's Federal Practice* ¶ 101.90 (3d ed. 2001). Mootness can occur by virtue of a decision rendered by another court. *Aiana v. Judiciary of Hawaii*, 17 F.3d 1244, 1248 (9th Cir. 1994). If the case becomes moot on appeal, this Court lacks jurisdiction to consider the issue. *Powell*, 395 U.S. at 496.

Petitioners' action was originally filed in federal court in Louisiana and transferred to the District Court for the Western District of Wisconsin. The district court, on motions for summary judgment, dismissed the action against Karleen Hillery on the grounds the court lacked personal jurisdiction. The court granted summary judgment in favor of a number of the other defendants on the merits of the case. Petitioners moved the court to retransfer the case to Louisiana maintaining that the transfer had been improper because the

Wisconsin district court did not have jurisdiction over all the defendants. That motion was denied. Petitioners appealed to the Seventh Circuit Court of Appeals.

The court of appeals determined that the district court had erred in finding no jurisdiction over Hillery. (Pet. App. 7a, 11a) The appellate court also affirmed the district court's rulings on the merits of the case as to the other defendants. (Pet. App. 11a) The court recognized that the fact the district court had made an erroneous decision on jurisdiction really had no impact on Petitioners' current position. The court stated:

> Supposing the district judge had gotten Wisconsin law right when she ruled on Hillery's motion to dismiss for want of personal jurisdiction (that is, supposing she had anticipated the decision in Forgues), Hillery would be a party to the present case and the claim against her, which is indistinguishable from that against her company, Subscriptions Plus, would have gone down the drain with that claim. As it is, the claim against her remains alive in the district court [the second action]—if barely, since the defendants have moved to dismiss it as barred by res judicata. Still, the plaintiffs are no worse off, or, in any practical sense, differently situated, than if the district judge had not mistakenly dismissed Hillery, thus raising the retransfer issue.

(Pet. App. 7a) In other words, the issue is in fact moot, because any relief requested in regards to the jurisdiction issue no longer would serve any purpose to the Petitioners. It is this very issue and the only issue, for which the Petitioners seek certiorari from this Court.

Further, the fact that the district court initially dismissed the case as to Hillery, as the appellate court noted, has no effect. The district court in her decision held that if it had jurisdiction over Hillery, the same findings as to Subscriptions Plus, Inc. (resulting in the granting of summary judgment in favor of Subscriptions Plus, Inc.) would be applicable to Hillery. The court of appeals considered the merits of the summary judgment motions filed by the defendants. It concluded that had the district court ruled correctly that it had personal jurisdiction over Hillery, the claims against Hillery would have been dismissed on summary judgment along with the claims against Subscriptions Plus, Inc. (Pet. App. 7a)

The court of appeals also referred to a second action filed by the Petitioners. *Id.* Following the district court's denial of Petitioners' motion to retransfer, Petitioners started two other actions against Hillery and other defendants[2] in Louisiana. The cases were consolidated and transferred back to Wisconsin. (Pet. App. 6a) This time, however, neither Petitioners nor Hillery raised the issue of a lack of jurisdiction over Hillery.[3]

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2. Petitioners' initial action was against Hillery, Subscriptions Plus, Inc., Y.E.S.! Inc., Choan Lane, Jeremy Holmes, Heart of Texas Dodge, Inc., Scottsdale Insurance Company, Acceptance Insurance Company, Progressive Northern Insurance Company, Allstate Insurance Company, Universal Underwriters Insurance Company and Mutual fire and Automobile Insurance Company. The second actions are against Hillery, Progressive Northern Insurance Company, Scottsdale Insurance Company, Acceptance Insurance Companies, Choan A. Lane, Jeremy Holmes and National Publishers Exchange.

3. Around that same time, a Wisconsin state court in Dane County, in a case arising from the same accident, found jurisdiction over Hillery.

In the second action, defendants filed motions to dismiss based upon the doctrines of issue and claim preclusion. The District Court for the Western District of Wisconsin recently issued a decision on those motions. The court acknowledged that the court of appeals had confirmed that the district court had jurisdiction to decide the first case. (Res. App. 4a) While the court dismissed the negligence claims and contract claims as barred by the doctrines of issue and claim preclusion the court permitted the false representation and alleged fraudulent advertising for labor claims to proceed against Hillery and other defendants because those claims were not alleged in Petitioners' initial action. (Res. App. 9a-10a, 14a)

In Petitioners' subsequent actions against Hillery, the district court again considered Petitioners' claims against Hillery arising out of the accident. The court noted that Petitioners had added new causes of action and incorporated some of the earlier ones concluding:

> The vast majority of them do not raise any new issues in the sense that they relate to matters not previously litigated. Plaintiffs assert defendant Hillery's alleged responsibility for providing plaintiffs' son with safe transportation, her alleged relationship to the driver of the van or the head of the crew in which plaintiffs' son was working, her alleged negligent hiring, her alleged negligent entrustment of the van to the head of the crew, her alleged supplying of drugs and alcohol to the crew members, her alleged false representations about the nature of the magazine selling jobs, her alleged fraudulent advertising for labor (which appears to overlap the alleged false

> representations), her involvement in a joint enterprise with others, including defendant National Publishers Exchange and her breach of her contract with plaintiffs' son to provide him safe transportation. Despite the new packaging, most of plaintiffs' claims are simply rehashed versions of the allegations they made against Subscriptions Plus and Hillery the first time around.

(Res. App. 4a-5a) The case is currently pending before the District Court in the Western District of Wisconsin. Petitioners are no differently situated than if the first case had been retransferred to Louisiana.

If this case had been transferred back to Louisiana for a jurisdictional analysis, the Louisiana court would either have dismissed the case for improper venue or transferred the case to Wisconsin because Wisconsin, not Louisiana, is the proper venue in this case. (Pet. App. 16a). The District Court for the Eastern District of Louisiana determined that Louisiana was not a proper venue for suing the defendants because the defendants did not reside there and "a substantial part of the events or omissions giving rise to the claim" had not taken place there. (Pet. App. 6a)

The relief, therefore, requested by Petitioners in this writ would no longer serve any purpose. *See* 15 James Wm. Moore, *Moore's Federal Practice*, ¶ 101.90 (3d ed. 2001). The question before this Court is moot.

II. PETITIONERS SHOULD BE FOUND TO HAVE WAIVED THE ISSUE OF WHETHER TRANSFER WAS PROPER.

Petitioners' actions should support a finding of waiver in this case. After the action was filed in the District Court for the Eastern District of Louisiana, one of the defendants, Allstate Insurance Company, filed a motion to dismiss, or in the alternative, a motion to transfer the case to Wisconsin on the grounds that Wisconsin was the proper venue. The Petitioners opposed the motion but *never* raised the issue of a lack of jurisdiction over any of the defendants as grounds for opposing the transfer.

The case was transferred to the Western District of Wisconsin on January 21, 2000. Following the transfer, Petitioners did nothing with regard to the transfer. They filed no motion to retransfer the case. They raised no issue concerning a lack of jurisdiction by the Wisconsin court over Hillery. An appropriate procedure for a party seeking relief from the transfer is to move for retransfer from the transferee court. *National-Standard Co. v. Adamkus*, 881 F.2d 352, 356 (7th Cir. 1989). The Wilds made no such motion or raised any jurisdictional issue before the District Court when the case was transferred.

Subsequently, this case proceeded in the Western District of Wisconsin. Much discovery took place over the next eight months. Following discovery and pursuant to the court's scheduling order, numerous parties, including SPI and Hillery, filed summary judgment motions. In conjunction with those motions, the parties filed extensive briefs, affidavits, and proposed findings of fact and conclusions of law. In her brief, Hillery sought dismissal based upon a lack

of jurisdiction and upon the merits of the case. In response, Petitioners, contrary to their current position, argued that the Wisconsin court had jurisdiction over Hillery. Again, Petitioners *never* argued in the alternative, that if there was no jurisdiction, the Wisconsin court should retransfer the case to Louisiana.

On December 6th, 2000, in a 38-page decision on the summary judgment motions, the district court granted summary judgment to the defendants, including Hillery.[4] Only then, after an adverse decision by the court granting judgment in favor of Hillery and the other defendants, did the Petitioners for the first time, raise the issue that the transfer was improper for lack of jurisdiction.

Petitioners had ample opportunity to raise the issue before the Louisiana court and ample opportunity to raise the issue before the district court, prior to the court's order granting summary judgment. While Petitioners raised the issue prior to the district court's entry of judgment, they did so only after the parties spent substantial time and money conducting discovery and extensively briefing the merits of the case for summary judgment. In addition, the district court likely had spent substantial time considering and deciding the motions. Petitioners should not be allowed to utilize the transfer provisions of § 1406(a), after an adverse decision by the court on motions for summary judgment, to circumvent the court's ruling to get another "kick at the cat."

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4. As to Acceptance Insurance Companies, the court denied its motion as moot since it couldn't be liable if its insureds were dismissed. (Pet. App. 52a).

Waiver is an equitable doctrine invoked by courts to further the interests of justice. *L. Orlik v. Helm Products, Inc.*, 427 F. Supp. 771, 776 (D.C.N.Y. 1977). It is a discretionary doctrine. *McKnight v. Gingras*, 966 F. Supp. 801, 809 (E.D. Wis. 1997). Courts have consistently disfavored party's attempts to advance new arguments or evidence once a matter has been litigated and have utilized the doctrine of waiver.

In *National-Standard Co. v. Adamkus*, 881 F.2d 352 (7th Cir. 1989), the court held that a party raising for the first time on appeal, whether the transfer order changing venue was properly granted, had waived the issue. *Id.* at 356. In this case, the Petitioners raised the issue prior to appeal, but not until after the court rendered a decision dismissing Petitioners claims against the defendants. In the interests of justice, fairness, and judicial economy, Petitioners should not be able to seek retransfer for the first time upon receipt of an adverse decision.

In *Moro v. Shell Oil Company*, 91 F.3d 872 (7th Cir. 1996), following the district court's granting of summary judgment in favor of the defendant, the plaintiff moved to alter or amend the judgment, pursuant to Rule 59(e). The district court denied plaintiff's motion. On appeal the court upheld the district court's ruling:

> The rule does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment.

Id. at 876 (*citing LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995)).

In *Van Dusen v. Barrack*, 376 U.S. 612, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964), this Court, in addressing the issue of a party changing venue, pursuant to 28 U.S.C. § 1404(a), to obtain a more favorable state law, stated:

> The legislative history of § 1404 (a) certainly does not justify the rather startling conclusion that one might 'get a change of law as a bonus for a change of venue.' Indeed an interpretation accepting such a rule would go far to frustrate the remedial purposes of § 1404(a). If a change of law were in the offing, the parties might well regard the section primarily as a forum-shopping instrument. * * * We believe, therefore, that both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms.

Id. at 636-37. *See also Krueger International, Inc. v. Blank*, 225 F.3d 806, 810 (7th Cir. 2000) (where the court held that a party had waived an argument since "it had ample opportunity to present this alternative argument prior to entry of judgment.)

Similarly in the present action, Petitioners should not be permitted to seek retransfer of the action in hopes of obtaining a better result, after the case has been completely litigated and they received an adverse decision. The Wisconsin district court commented:

> Transferring the case back to Louisiana would undermine the interests of justice because doing so would greatly delay the trial. Finally, plaintiffs have not lost the ability to bring suit against

> defendants whom this court has dismissed. Nothing prevents plaintiffs from filing suit against those defendants in a district where personal jurisdiction exists.

Id. at (Pet. App. 19a). This Court should deny the writ as Petitioners have waived the issue.

CONCLUSION

The Petition should be denied on the grounds that the question presented is moot and therefore the Court lacks jurisdiction over this case. In the alternative, the Petition should be denied on the grounds that the Petitioners have waived the issue presented to this Court.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED SEPTEMBER 30, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

01-C-0461-C

DONALD R. WILD and DIANA H. WILD, Individually and as representatives of the Estate of Joseph Donald Wild,

Plaintiff,

v.

KARLEEN HILLERY; PROGRESSIVE NORTHERN INSURANCE COMPANY; SCOTTSDALE INSURANCE COMPANY; ACCEPTANCE INSURANCE COMPANIES; CHOAN A. LANE, JEREMY HOLMES; and NATIONAL PUBLISHERS EXCHANGE,

Defendants.

Appendix

01-C-0463-C

DONALD R. WILD and DIANA H. WILD, Individually and as representatives of the Estate of Joseph Donald Wild,

Plaintiff,

v.

KARLEEN HILLERY; SCOTTSDALE INSURANCE COMPANY; ACCEPTANCE INSURANCE COMPANIES; CHOAN A. LANE, JEREMY HOLMES; and NATIONAL PUBLISHERS EXCHANGE,

Defendants.

OPINION AND ORDER

These are civil actions brought by the parents of a young man killed in a van accident while he was working as a magazine subscription salesman. The actions duplicate in large part an action filed by plaintiffs in 2000 and closed in 2001, *Wild v. Subscriptions, Plus, Inc.*, 00-C-0067-C. For that reason, most of the defendants moved for dismissal from the actions on the ground that principles of claim preclusion barred any further litigation against them. In an opinion and order entered on May 13, 2002, I dismissed certain defendants from the suits after finding that they were correct in asserting that claim preclusion barred new suits against them but I concluded that the doctrine would not bar suits against the remaining defendants for various reasons. As to defendant Karleen Hillery, she had been dismissed from plaintiffs' original suit, not on the merits but because the court lacked personal jurisdiction over her. Her insurers,

defendants Acceptance and Scottsdale, remained potentially liable as long as she might still have some liability. Defendants Choan A. Lane and Jeremy Holmes had been dismissed on the basis of a settlement; no judgment had been entered as to them. Defendant National Publishers Exchange was not a party to the original action; obviously no judgment on the merits had been issued as to it. I noted that although claim preclusion was not applicable to the claims against these defendants, issue preclusion might bar further litigation of the suits and I invited the parties to submit supplemental briefs on the subject. All except defendants Lane and Holmes responded to the invitation.

As a general rule, claim preclusion refers to the effect that a prior judgment has in foreclosing successive litigation of the same claim or cause of action against the same party; issue preclusion refers " 'to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim.' " *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001) (citing *Restatement (Second) of Judgments* §§ 17, 27 (1980)). Issue preclusion requires a showing that the same issue has been actually litigated and necessarily decided in a prior action and that the party against whom preclusion is asserted was a party to the prior action. *Garza v. Henderson*, 779 F.2d 390, 393 (7th Cir. 1985). It is not necessary that the person asserting preclusion have been a party to the previous action. If a party can be barred from re-litigating the issue with its opposing party, it can be barred from litigating the issue against a third party, unless the party to be precluded deserves an additional opportunity to litigate

the issue because of particular circumstances, such as the lack of a full and fair opportunity to litigate in the first action. *Restatement (Second) of Judgments* § 29. *See also Adair v. Sherman*, 230 F.3d 890, 893 (7th Cir. 2000) (" 'Under collateral estoppel (currently referred to as issue preclusion], once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.' ") (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)).

It is undisputed that the earlier case was decided by a court of competent jurisdiction. Although plaintiffs argued strenuously to the contrary, both in that case and in these two, the Court of Appeals for the Seventh Circuit has confirmed that this court did have jurisdiction to decide the first case. *Wild v. Subscription [sic] Plus, Inc.*, 292 p.3d 526 (7th Cir. 2001). I turn then to the question whether the issues raised by plaintiffs in these two new cases are ones that were "actually and necessarily determined" an plaintiffs' previous case, 00-C-0067-C, as to each of the remaining defendants.

A. *Karleen Hillery*

In their pleadings in these cases, plaintiffs have added new causes of action against defendant Hillery and incorporated some of their earlier ones. The vast majority of them do not raise any new issues in the sense that they relate to matters not previously litigated. Plaintiffs assert defendant Hillery's alleged responsibility for providing plaintiffs' son with safe transportation, her alleged relationship to the driver of the van or the head of the crew in which plaintiffs' son

was working, her alleged negligent hiring, her alleged negligent entrustment of the van to the head of the crew, her alleged supplying of drugs and alcohol to the crew members, her alleged false representations about the nature of the magazine selling jobs, her alleged fraudulent advertising for labor (which appears to overlap the alleged false representations), her involvement in a joint enterprise with others, including defendant National Publishers Exchange and her breach of her contract with plaintiffs' son to provide him safe transportation. Despite the near packaging, most of plaintiffs' claims are simply rehashed versions of the allegations they made against Subscriptions Plus and Hillery the first time around.

In the previous case, I found that Subscriptions Plus could not be held liable for any of plaintiffs' claims of negligence in hiring or in supervising plaintiffs' son. Wisconsin's worker's compensation law barred any court action against Subscriptions Plus if it were Joseph Wild's employer or if Joseph Wild were working as an independent contractor in relation to Subscriptions Plus; plaintiffs had failed to produce evidence to support a finding of liability arising out of the negligent acts of an independent contractor of theirs who employed Joseph Wild; plaintiffs had adduced no evidence to support a finding that Subscriptions Plus had committed a negligent act that resulted in Joseph Wild's death. In drawing these conclusions, I found necessarily that defendant Hillery could not be liable for any of these claims because corporations act only through their officers, employees or agents. If plaintiffs had produced any evidence that defendant Hillery (or any other employee of Subscriptions Plus) had acted in a way that would have made the corporation liable to plaintiffs,

I could not have found the corporation free from liability. This implicit finding has as much preclusive effect as an explicit finding. *Cook County v. MidCon Corp.*, 773 F.2d 892, 902 n.2 (7th Cir. 1985) ("Any contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue, then, is subsumed in that issue and precluded by the prior judgment's collateral estoppel effect") (quoting 1B. *Moore's Federal Practice* ¶ 0.443[2] at 761). In fact, I made the finding explicit when I noted that if defendant Hillery had not been dismissed for lack of personal jurisdiction, the findings as to Subscriptions Plus would apply to her.

In the earlier suit, I found also that Subscriptions Plus could not be held liable for breach of contract because plaintiffs had failed to adduce any evidence that this defendant had ever entered into an agreement with Joseph Wild. The doctrine of issue preclusion bars plaintiffs from pursuing this issue with respect to defendant Hillery.

Plaintiffs repeat reflexively their old argument that they never had a chance to be heard because of the court's refusal to entertain their untimely filed proposed findings of fact and brief in opposition to defendants' motion for summary judgment. As I explained in the May 13 order, the *opportunity to be heard* is not the same as *being heard*, which is something that can be forfeited or waived. Plaintiffs had the required opportunity but forfeited it by missing the deadline. Moreover, their submissions were deficient; even if they had been timely, they would not have advanced plaintiffs' case. For example, plaintiffs responded to a fact proposed by defendants Hillery and Subscriptions Plus to the effect that

neither defendant owned the vehicles that Choan Lane used in his business by saying: "Denied. Subscriptions Plus and Hillery provided vehicles used by the independent distributors and the independent contractors to sell magazines. See Plaintiffs' brief and evidence submitted therein in support of the argument." This response does not comply with the court's rules on summary judgment, which specify that the response is to be supported by citations to admissible evidence in the record. Merely telling the court to look at unspecified evidence in the brief is not compliance, particularly when the brief refers the court to "attached exhibits" that are not attached. Plaintiffs describe their "evidence" as Subscriptions Plus's web site pages, showing that Subscriptions Plus offered transportation for its independent contractors. Assuming there is such evidence, it does not shed light on the legal relationships among Joseph Wild and Subscriptions Plus and Hillery. In any event, plaintiffs failed to convince the court of appeals that they were denied the right to be heard. That should be an end to the issue.

Plaintiffs argue that the court never determined whether Joseph Wild was an employee of Subscriptions Plus. They are correct. I did not make the determination because there was no reason to. Whatever relationship Subscriptions Plus and Hillery had to Joseph Wild, they could not be held liable to him on the facts in the summary judgment record.

Plaintiffs argue that the court did not decide what Hillery's liability would be under the third assumption, that Wild was an employee of Y.E.S./Lane and Y.E.S./Lane was an independent contractor. I determined that Subscriptions Plus would have no liability for the torts of the independent

contractor because I found that plaintiffs had not shown that the company had a non-delegable duty to the employees of Y.E.S./Lane. Implicit in that finding was the related finding that Hillery had no duty to provide safe transportation, to insure the hiring of competent drivers or to supervise the drivers of the van. Obviously, if plaintiffs had been able to show that Subscriptions Plus's president, defendant Hillery, had assumed such a duty, I would not have reached the conclusion I did about Subscriptions Plus's liability. The same conclusion follows from plaintiffs' failure in the earlier case to show that Joseph Wild believed that defendant Y.E.S./Lane was an agent of defendant Subscriptions Plus and relied upon that belief or to show that defendant Subscriptions Plus engaged in an "affirmative act" of negligence that increased the danger Joseph Wild or to show that the company's own negligence caused Joseph Wild's death.

Citing the state court's ruling in a related action, plaintiffs contend that this court could have found that Hillery had sufficient control to defeat the argument that Y.E.S. was an independent contractor, that in fact she furnished the vehicles to the crews, provided transportation, paid their expenses and issued quotas to the sales force. They quote the state judge's finding that "Hillery gave orders on who was to drive which car because one of them was her luxury van." They argue, incorrectly, that this court has never decided Hillery's role. I did decide Hillery's role, by implication, as I have explained. That decision might have been different had plaintiffs supplied to this court the evidence that was before the state court. They did not do so when they had the opportunity. They cannot reopen issues now that have been

decided in case 00-C-0067-C simply because another judge has reached a different decision in another case involving defendant Hillery.

As for plaintiffs' claim that Hillery's involvement is supported by the affidavit of Choan Lane, they neglect to mention that at the time they responded to defendants' motion for summary judgment in the original case they had not taken Lane's deposition and had no affidavit from him. They leave out the additional fact that the magistrate judge subsequently ruled Lane's affidavit and testimony inadmissible because Lane refused to testify at his deposition on most matters. Plaintiffs cannot avoid the effect of adverse rulings in Case No. 00-C-0067-C by filing a new suit raising the same issues.

All this discussion may well be extraneous, as well as redundant. The Court of Appeals for the Seventh Circuit dealt with the whole matter far more succinctly in its decision affirming the dismissal of Subscriptions Plus in the earlier case. It observed that if defendant Hillery had been properly found subject to personal jurisdiction in Wisconsin, she "would be a party to the present case and the claim against her, which is indistinguishable from that against her company, Subscription Plus, would have gone down the drain with that claim," *Wild*, 292 F.3d at 530. I conclude that the doctrine of issue preclusion bars plaintiffs' negligence and contract claims.

This leaves only the allegations that defendant Hillery made false representations about the nature of the magazine selling jobs and her alleged fraudulent advertising for labor.

Although plaintiffs do not make it entirely clear, it appears that they are alleging intentional acts rather than negligent ones. Their claims of intentional wrongdoing were not litigated in the previous suit and therefore, are not barred by issue preclusion. I have serious doubts whether plaintiffs can prove either that defendant Hillery made false representations to Joseph Wild that he relied upon or that his reliance was a legal cause of his death, but at this point, I cannot say that plaintiffs cannot go forward on these two allegations.

B. *Scottsdale and Acceptance*

Scottsdale Insurance Company and Acceptance Insurance Companies remain in this suit only because of their possible duty to insure or defend defendant Karleen Hillery. So long as she remains a party, they do too.

C. *National Publishers Exchange*

Plaintiff alleges that defendant National Publishers is liable for misrepresentation and fraudulent advertising, as a joint venturer with Subscriptions Plus. These allegations are new as to this defendant, which was not a party to the previous litigation. I have serious doubts whether any of them can be proven, but at this stage of the litigation, I cannot say that they are barred by issue preclusion, which is the only ground that I am considering on this motion for summary judgment. If defendant National Publishers has reason to believe that plaintiffs lack evidentiary support for their allegations and will not secure such evidence after they have had a reasonable time for discovery, defendant can follow the procedures in Fed. R. Civ. P. 11 for seeking sanctions against plaintiffs.

Appendix

Plaintiffs name National Publishers in four counts. Only three could be considered actual causes of action. In count 8, plaintiffs allege that National Publishers, along with defendants Subscriptions Plus, Hillery, Y.E.S. and Lane are equitably estopped from raising the defense that Joseph Wild was an employee of any of the defendants (in which case, plaintiffs' only remedy would be under Wisconsin's Worker's Compensation Act). As National Publishers points out, this is not a cause of action but the anticipation of an affirmative defense that defendants might raise. In count 9, plaintiffs allege that defendant National Publishers participated in a common scheme or plan with Subscriptions Plus, Hillery, Y.E.S. and Lane, which involved the making of false representations or the failure to prevent the making of false representations in order to lure young adults such as Joseph Wild into magazine sales work. In count 11, plaintiffs allege that defendants National Publishers, Subscriptions Plus, Y.E.S., Lane and Hillery were involved in a joint venture, thus making each of them liable for the negligence of the others. In count 12, plaintiffs allege that defendant National Publishers participated with one or more of Subscriptions Plus, Hillery, Y.E.S. and Lane in the development of various magazine marketing and selling schemes and that they lured Joseph Donald Wild "from his home by false or deceptive representations and/or false pretenses regarding the kind and character of the work to be done, the amount and character of the compensation to be paid for work, the providing of safe transportation, and the conditions of employment relating to his streets trades activities as a seller of magazines." Cpt., dkt. #1, at 19.

Conceding that they cannot pursue the claim that National Publishers is vicariously liable as a joint venturer for the negligence of Subscriptions Plus, as alleged in the eleventh cause of action, now that Subscriptions Plus has been dismissed from the action on the grounds of claim preclusion, plaintiffs suggest that they can proceed on the theory that National Publishers was part of an enterprise that included Y.E.S./Lane. This is true only if plaintiffs have grounds for showing that any of the alleged joint venturers was negligent. As a matter of law, defendants Subscriptions Plus and Hillery could not be held liable under a theory of negligence but no such finding has been made as to defendants Y.E.S, and Lane. Y.E.S. is no longer a party to this case but that does not mean that plaintiffs could not prove it was negligent and that it was engaged in a joint venture with National Publishers. (Y.E.S. was dismissed from these cases in the same May 13, 2002 order in which Subscriptions Plus was dismissed.)

Defendant National Publishers argues that it cannot be held vicariously liable for Lane's negligence because Lane has been released from the case by settlement. However, a review of the release shows that plaintiffs released Lane from the prior case only as to claims for which he and Jeremy Holmes had liability coverage provided by Allstate Insurance Company and Allstate Indemnity Company. Plaintiffs made an express reservation of any claims for which Lane and Holmes might have insurance coverage provided by a different insurer, It seems unlikely that Lane and Holmes have any such additional coverage, given plaintiffs' inability to ferret out any in the first case, but I cannot say that they

do not. Moreover, plaintiffs' allegations are not limited to negligence; they allege a scheme to make or authorize the making of false representations, which is an intentional tort.

Defendant argues that issue preclusion bars the allegations of false representations and false advertising made in the ninth and twelfth causes of action because this court found previously as undisputed the fact that defendant Subscriptions Plus had no involvement in the selection of employees for the Y.E.S. sales crew. Defendant mischaracterizes the finding. I did find that defendants Holmes and Lane did the selecting and hiring but I never found that Subscriptions Plus had no involvement in the selection or that the company never made any misrepresentations or engaged in false advertising. Although plaintiffs are barred from asserting these claims against defendants Subscriptions Plus and Y.E.S.!, they are not barred from asserting them against defendant National Publishers, Hillery and Lane (to the extent that the claims against Lane are covered by insurance issued from a company other than Allstate). However, before plaintiffs can continue to prosecute the case, they will be required to amend their pleadings against the remaining defendants to conform with the requirements of Fed. R Civ. P. 9(b), that the circumstances underlying allegations of fraud must be stated with particularity. Plaintiffs will have to identify the exact representations and advertisements they contend were false, who made them, when and to whom and in what circumstances.

Appendix

ORDER

IT IS ORDERED that

(1) Defendant Karleen Hillery's motion for dismissal on the ground of issue preclusion is DENIED with respect to plaintiffs Donald R. Wild and Diana H. Wild's claim that she made false representations, engaged in false advertising upon which plaintiffs' son relied to his detriment and engaged in a scheme to do these things; in all other respects, it is GRANTED;

(2) The motions for dismissal filed by defendants Acceptance Insurance Companies and Scottsdale Insurance Company are DENIED;

(3) The motion for dismissal on the ground of issue preclusion filed by defendant National Publishers Exchange is DENIED; and

(4) Plaintiffs may have until October 15, 2002, in which to amend their complaints in these cases to set forth their allegations of fraud with the particularity required by Fed. R. Civ. P. 9(b). Failure to file timely amended complaints may lead to the dismissal of both cases.

Entered this 30th day of September, 2002.

BY THE COURT:

s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge